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IN THE

Supreme Court of the United States

October Term, 1956

No. 215

UNITED STATES OF AMERICA, *Petitioner*

v.

KOPPERS COMPANY, INC., Successor on Merger to Koppers United Company and Subsidiaries

On Petition For A Writ Of Certiorari To The United States Court of Claims

BRIEF FOR THE RESPONDENT IN OPPOSITION

DAVID W. RICHMOND,
1001 Connecticut Avenue,
Washington 6, D. C.
Attorney for Respondent.

Of Counsel:

ROBERT N. MILLER,
FREDERICK O. GRAVES,
MILLER & CHEVALIER,
1001 Connecticut Avenue,
Washington 6, D. C.

E. S. RUFFIN, JR.,
C. M. CRICK,
Koppers Building,
Pittsburgh 19, Pennsylvania.

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OPINION BELOW

The opinion of the Court of Claims is reported at 134 F. Supp. 290.

JURISDICTION

The judgment of the Court of Claims was entered on January 31, 1956. The time within which to file a petition for writ of certiorari was extended, by order of the Chief Justice, to June 29, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255(1).

QUESTION PRESENTED

Whether the unused excess profits credit of the surviving corporation in a Delaware statutory merger may be carried back to a taxable year prior to the merger to reduce the consolidated excess profits net income of the merged corporations under Section 710(c)(3)(A) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

The applicable portions of the pertinent statutes are set forth in the Appendix, infra, p. 8.

STATEMENT

The facts as stipulated and found by the Court of Claims may be summarized as follows.

Koppers United Company and its subsidiaries filed a consolidated excess profits tax return for the year 1943. On November 10, 1944, for the purpose of integrating the operations of the companies, Koppers United Company and its subsidiaries were merged into Koppers Company, Inc., the plaintiff, a corporation organized for this particular purpose. (R. 20-21.) After the merger, the plaintiff had all the powers, franchises, assets, and liabilities of the merged companies under Section 60 of the Delaware General Corporation Law and carried on the same operations. (R. 34.)

For the taxable period ended December 31, 1944, the deductions of the plaintiff exceeded its gross income so that it had no excess profits net income for that period. (R. 26.) It did have an excess profits credit for that period determined from the statutory base period experience of the companies merged into it, as provided for in Sections 740 and 742 of the Internal Revenue Code of 1939. Since the plaintiff had no excess profits net income against which to apply this credit, it was all unused.

The plaintiff sought to carry back this unused credit, but the Commissioner refused to permit it. The Court of Claims, in a unanimous decision, held that the plaintiff was entitled to the carry-back and entered judgment for the plaintiff.

REASONS FOR DENYING THE WRIT

The decision of the Court of Claims is not in conflict with any appellate decision and does not involve the same question as that raised in *Libson Shops, Inc.* v. *Koehler,*

No. 64 this Term, certiorari granted June 4, 1956. It is in agreement with the two other appellate decisions which have disposed of this question, and the decision is correct. The question here presented is no longer of any public importance since the statutory provisions involved were repealed more than 10 years ago (1945).

1. The Government does not allege any conflict, but grounds its petition here on the assertion that the question is "similar" to that presented in *Libson*. (Petition, p. 5.) Indeed, in its Brief in Opposition to the granting of the writ in *Libson*, the Government acknowledged that there was no conflict between that case and *Stanton Brewery, Inc.* v. *Commissioner*, 176 F.2d 573 (C.A. 2d, 1949), and *E. & J. Gallo Winery* v. *Commissioner*, 227 F.2d 699 (C.A. 9th, 1955). Both of these cases held that unused excess profits credits of merged companies could be carried over to reduce the excess profits net income of the surviving corporation for a year following the statutory merger. Thus, *Stanton*, *Gallo* and the instant case are all in accord.

The Government's only reference to the instant case is a footnote in the *Libson* petition in which it said that—

> "The decision below was entered before expiration of the time to apply for certiorari in the *Gallo* case, and the Government obtained an extension of time until April 7, 1956, in order to consider the advisability of applying for certiorari in that case in the light of the decision below. *After consideration, it was concluded that no petition should be filed because of the absence of a conflict.* Nor has a petition been filed by the Government in *Koppers Co.* v. *United States*, 134 F. Supp. 290 (C. Cls.), which presents a similar question and follows *Stanton*. However, the Government has obtained an extension of time for filing a petition in the *Koppers* case until June 29, 1956, because of the possibility that a conflict may be created by the pending case of *Newmarket Manufacturing Co.* v. *United States*, awaiting decision by the First Circuit Court of Appeals." (Emphasis supplied.)

In its application for an extension of time within which to file a petition for a writ of certiorari in the present case, the Government said:

> "Whether the Government will deem it advisable to file a petition in the instant case may be very significantly affected by the outcome of the *Newmarket* case * * *."

Since *Newmarket* has now been decided in favor of the taxpayer, any such conflict has failed to develop. Hence the Government is left with no conflict and merely argues that certiorari should be granted by this Court because the question involved is "similar" to that in *Libson*.

2. The decision of the Court of Claims is in agreement with the only other appellate decisions which have passed upon the question here presented. Both *Stanton* and *Gallo* held that a statutory merger is not a bar to the carry-over of an unused excess profits credit. In neither case did the Government petition for certiorari. No suggestion has been made by the Government that there is any distinction between a carry-over and a carry-back of such a credit and none can properly be made. Compare Sections 710(c)(3)(A) and (B) of the Internal Revenue Code of 1939. The Court of Claims, the Second Circuit and the Ninth Circuit are all in agreement on the question here presented, and no other Circuit Court has held otherwise.

3. The question here presented is of no public importance. Carry-overs of net operating losses such as those involved in *Libson* are still provided for in the taxing statutes. The present case, however, arises under the World War II excess profits tax which was repealed over ten years ago. Having failed to petition for certiorari in *Stanton* (1949) and *Gallo* (1955), in both of which the taxpayer received the benefit of a carry-over of an unused excess profits credit, the Government now seeks to persuade this Court to consider whether a different rule should be applied to this taxpayer. We respectfully submit that the matter is

now of no public importance, and that since the Court of Claims, the Second Circuit and the Ninth Circuit are in agreement on the law, the writ should be denied.

4. The decision of the Court of Claims is correct. It is apparent from the interrelationship of Sections 710, 712, 713, 742, and 740 that Congress has provided that a corporation such as the plaintiff and its components shall be treated as the same taxpayer for the purpose of determining its unused excess profits credit. Congress has provided in Section 710 (c)(3)(A) that such an "unused excess profits credit shall be an unused excess profits credit carryback for each of the two preceding taxable years." Thus, the specific language of the applicable sections allows the taxpayer the carry-back in this case.

Aside from the fact that Congress has specifically provided that corporations such as the plaintiff and its components are to be treated as the same taxpayer for purposes of Section 710, it is well settled that a surviving corporation in a statutory merger is the same taxpayer as the merged corporations.

Under Section 60 of the Delaware Corporation Law, the merger into the plaintiff of the four constituent companies resulted in the absorption by the plaintiff of the identities of those companies and their existence continued in the plaintiff. *Argenbright* v. *Phoenix Finance Co. of Iowa*, 21 Del. Ch. 288, 187 A. 124 (1936); *Aspinook Corp.* v. *Commissioner*, 326 Mass. 327, 94 N.E. 2d 366 (1950). This Court in *Helvering* v. *Metropolitan Edison Company*, 306 U.S. 522 (1939), endorsed the principle that "the identity of the corporation [which was merged] continues in the successor ***". Therefore, the plaintiff here is the same "taxpayer" as the consolidated group of companies merged into it and is entitled to carry back its 1944 unused excess profits credit to reduce the 1943 tax liability of the merged corporations. *Stanton Brewery, Inc.* v. *Commissioner*, 176 F.2d 573 (C.A. 2d, 1949); *E. & J. Gallo Winery* v. *Commissioner*, 227 F.2d 699 (C.A. 9th, 1955).

Also, upon consummation of a statutory merger, the surviving corporation becomes directly and primarily liable as "the taxpayer"—and not secondarily liable as transferee—for the income and excess profits taxes of its constituent companies for years prior to the merger. *Commissioner* v. *Oswego Falls Corporation,* 71 F.2d 673 (C.A. 2d, 1934); *United States* v. *Oswego Falls Corporation,* 113 F.2d 322 (C.A. 2d, 1940); *Adrian & James, Inc.,* 4 T. C. 708 (1945); and *The Koppers Coal Company,* 6 T. C. 1209 (1946). Since the surviving corporation is liable as the taxpayer for the taxes of its components for past years, it is only rational to allow it to use its unused credits against these taxes.

For purposes of review by the Tax Court, the surviving corporation is also treated as "the taxpayer" in situations involving transactions of its components before the merger. *Bowman Hotel Corporation* v. *Commissioner,* 24 B.T.A. 1193 (1931), and the many cases following that decision. It was treated as the same taxpayer for carry-over of the adjusted declared value for capital stock tax purposes in *Early* v. *Southgate Corporation,* 136 F.2d 217 (C.A. 4th, 1943). The surviving corporation was treated as the same taxpayer for the deduction of unamortized bond discount and expense in connection with a redemption of bonds of a component company in *Helvering* v. *Metropolitan Edison Co.,* 306 U.S. 522 (1939).

The *Metropolitan Edison* case, *supra,* squarely decided that the surviving corporation in a statutory merger was entitled to deduct the unamortized bond expense of the component because it was considered the same taxpayer as its component. For all practical purposes, and in substance, the surviving corporation in a statutory merger represents the continuation of the business of the components under a different form. As the Court stated in *Stanton*—

> "**** we must regard the 'resulting corporation' as the union of component corporations into an all-embracing whole which absorbs the rights and privileges, as well as the obligations, of its constituents." (176 F.2d 573, 575.)

The foregoing decisions leave no doubt that the plaintiff was liable as a result of the merger for the tax originally imposed upon its components for 1943. Whether that tax be the original tax or a deficiency determined before or after the merger or a tax retroactively imposed, the plaintiff's liability was primary and direct and not that of a transferee. Hence, the plaintiff here seeks merely to carry back its own unused credit against its own tax liability for a prior year.

5. Actually, the Government does not really urge that the writ be granted, but merely suggests that the petition be held in abeyance pending the Court's decision in *Libson*. (See Petition, p. 7, and Petition in *Newmarket*, p. 5.) This position is apparently taken with the thought that, in considering the net operating loss carry-over issue involved in *Libson*, the Court will go beyond the case before it "to consider the broad question whether a carry-over or carry-back may, in any circumstances, cross the line of a merger."

The Government does not suggest how the Court can properly decide an unused excess profits credit issue in a net operating loss case. The *Libson* case arises under Section 122 of the Internal Revenue Code which is substantially different from the setting and background of Sections 710, 712, 713, 740 and 742 of the Code under which this case arises. In addition, the tax benefit sought in that case resulted solely from the merger. Had the three corporations with the net operating losses not been merged with the fourteen other corporations, a tax benefit for the year under consideration would not have been available. In the instant case the unused excess profits credit arose after the merger and the tax benefit would have been available to the consolidated group in the absence of the merger.

We submit that for the reasons stated, the writ should be denied. If the Court is not so inclined, then we respectfully urge that the writ be granted and that an opportunity

be afforded the plaintiff to file briefs and present oral argument.

Respectfully submitted,

DAVID W. RICHMOND,
1001 Connecticut Avenue,
Washington 6, D. C.
Attorney for Respondent.

Of Counsel:
ROBERT N. MILLER,
FREDERICK O. GRAVES,
MILLER & CHEVALIER,
1001 Connecticut Avenue
Washington 6, D. C.
E. S. RUFFIN, JR.,
C. M. CRICK,
Koppers Building,
Pittsburgh 19, Pennsylvania.